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IN THE

Supreme Court of the United States

October Term, 1968

No. 87

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1291

UNITED STATES OF AMERICA,

Petitioner,

against

LELORD KORDEL and ALFRED FELDTEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Counter-Statement of Question Presented

Whether evidence, leads and admissions obtained by compulsory interrogatories directed to a corporation in a civil *in rem* case and answered by an officer of the corporation, should be suppressed in a criminal case against the corporate officers based upon the same facts, where the civil *in rem* and criminal cases went forward on a common front and the officers were the targets of the criminal case.

Counter-Statement of Facts

Prior to the present indictment, a civil *in rem* action was brought by the Government seeking condemnation of various drugs on the ground that they were misbranded

and violative of the Federal Food, Drug & Cosmetic Act, 21 USC 331 (a) and (k). In its conduct of the civil action, the Government served written interrogatories consisting of approximately 1,300 questions seeking comprehensive and detailed information and admissions about the activities of the respondents in connection with the business of Detroit Vital Foods, Inc. of which respondent Kordel was its President, and respondent Feldten its Treasurer. The interrogatories sought information and admissions as to virtually every aspect and element which formed the subject of the present criminal case, such as matters of interstate commerce, labeling, status and relationship of the respondents to Detroit Vital Foods, Inc. and almost every conceivable fact relative to the issue as to whether the drugs were misbranded in violation of the Act.*

Almost simultaneously with the service of the interrogatories, and on or about January 19, 1961, the Government served notice upon respondents and Detroit Vital Foods, Inc., pursuant to Section 305 of the Federal Food & Drug Act, that criminal action was contemplated against them for the same violations of the Act which were the subject of the civil case. On April 7, 1961, a motion was filed in the civil case for a protective order objecting to answering the Government's interrogatories, and to stay the civil proceedings and the filing of answers until after the disposition of the criminal action being planned by the Government, on the ground that through the use of interrogatories, the Government was attempting to obtain information not ordinarily available to it in the criminal case for use in planning and prosecuting the criminal

* The interrogatories and the answers thereto are set forth in defendants' supplemental appendix in the Court below, a copy of which was filed by petitioner as part of the record with the Clerk of this Court. See also pps. 56a-62a of defendants' Appendix also filed by petitioner as part of the record.

action against respondents. The motion was denied by the District Judge who reasoned that respondents would not necessarily be prejudiced since there was no certainty, when or if, a criminal action would be brought. The Court then ordered the filing of the answers to the interrogatories or suffer a forfeiture of the seized property. The civil action was thereafter terminated by a consent decree in which the Government agreed that the entry thereof would not constitute an admission that the Act had been violated.

On August 5, 1963, respondents and their corporation were indicted on the same acts of alleged wrongdoing set forth in the civil action. Respondents moved to quash the indictment and to suppress the evidence and leads obtained by the Government through the use of interrogatories in the civil action on the ground that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority and was violative of civilized standards of procedures in the administration of criminal justice" (55a). The District Court denied the motion to suppress, but granted a hearing. At the hearing it was developed that the civil case and the investigation of the criminal case had gone forward on a common front; that, indeed, the investigation of the civil and criminal cases were one and the same investigation and part of one file (80a, 81a and 84a); that the answers to the interrogatories had assisted the Government in commencing and prosecuting the criminal case; and that the answers were, in fact, used before the Grand Jury. Further, it was learned that the interrogatories were served at the very time that the FDA had under consideration the bringing of a criminal case for the identical offense (81a); that the interrogatories were prepared by the same person who recommended and whose office

prepared the indictment (102a, and 94a); that the answers to the interrogatories were filed on September 5, 1961 (89a) and a copy thereof immediately sent to the individual who handled the criminal prosecution (92a-93a); and that the decision to prosecute respondents was made by that same individual after he had received the answers to the interrogatories (92a). In short, the hearing established that the Government had filed the interrogatories to obtain answers to assist it in the preparation of the criminal case, had in fact utilized such answers to prepare the criminal case, and that the interrogatories had been prepared and the decision to prosecute made by the very same person!

Indeed, Government agents testified that because of the District Judge's order requiring answers to the interrogatories, the Government would have no difficulty in establishing the element of interstate commerce for the product involved in the criminal case (83a, 84a). In this connection, the Government agent further testified that it was a routine practice of the Food and Drug Administration to utilize discovery in civil cases to obtain evidence for criminal prosecution based upon the same offense (85a).

As far as the proceedings before the Grand Jury is concerned, the hearing further disclosed that an official of the FDA had entered the Grand Jury room armed with the proposed indictment which had been prepared by his FDA associate who had prepared the interrogatories, received the answers and recommended the indictment, and that the FDA official had used the answers to the interrogatories in his statement to the Grand Jury (72a).

Argument

The petition is based upon numerous erroneous assumptions and omissions of material facts and should not be granted.

1. The petition is based on the erroneous premise that the Court of Appeals held that the Food and Drug Administration may not utilize interrogatories in a civil *in rem* action against a corporation and thereafter commence a criminal prosecution for the same alleged illegal activities. The Court of Appeals made no such holding. Indeed, the Court specifically noted that it was not holding that a Government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. The Court specifically noted that its holding was *limited* to the proposition that the Government may not *use* evidence or leads against a defendant in a criminal case which has been obtained by compulsory interrogatories directed to and concerning the target of the criminal case, under penalty of either giving the evidence or suffering a forfeiture of property in the civil case (App. A, p. 26). The Court of Appeals thus merely held that under the facts of the instant case, the Food and Drug Administration had utilized Rule 33 F. R. Civ. P. to obtain admissions, evidence and leads from evidence not otherwise available in a criminal case, to investigate, commence and prosecute a criminal action, and that such evidence, leads and admissions should have been suppressed in the criminal case.

2. The Court of Appeals did not hold that the use of interrogatories in a civil case against a corporation confers immunity from prosecution for the misdeeds of individual officers of the corporation. As above noted, the

Court of Appeals made it clear that there was no immunity involved and that the Governmental agency was not prohibited from filing criminal proceedings against the same persons on the same charges that are involved in a civil proceeding. The government was restricted merely from *utilizing* the information obtained by cumpulsory discovery which is not ordinarily available in the investigation and prosecuton of a criminal case.

The petitioner has ignored the critical facts upon which the reversal by the Court of Appeals of respondents' conviction rested, namely, that the civil case and the investigation of the criminal case had gone forward on a common front; that information obtained in the civil case had been transmitted to those in charge of the criminal investigation; that the recommendation for criminal prosecution had not been made until after the District Judge had ordered the interrogatories to be answered in the civil case; that the interrogatories had been prepared by Mr. Randolph of the Food and Drug Administration in Washington, who also made the initial decision to recommend criminal action against the respondents; and that the answers to the interrogatories had been sent to Mr. Randolph and the indictment prepared in Mr. Randolph's office (App. A pp. 32a-33a). On the basis of these facts, and on the authority of *Wilson* v. *United States,* 221 U. S. 361, the Court of Appeals held that the submission by respondents of answers to the interrogatories violated respondents' Fifth Amendment privilege against self-incrimination since the answers had been signed by a respondent as an officer of the corporation.

3. Petitioner argues that the decision below has an adverse impact in the areas of antitrust, internal revenue and securities regulations where Federal agencies are vested

with the responsibility of administering statutes concerning civil and criminal remedies against offending corporations and individuals.. The fact is, however, that the holding of the Court below is entirely consistent with prior holdings of all Courts which have had occasion, under such statutes, to consider this question. See, for example, *U. S.* v. *Parrott,* 248 F. Supp. 196 (DC, 1965); *U. S.* v. *Lipshitz,* 132 F. Supp. 519 (EDNY, 1955); *U. S.* v. *Thayer,* 214 F. Supp. 929 (D. Colo., 1963); *U. S.* v. *Cigarette Merchandisers Association,* 18 FRD 497 (SDNY); *U. S.* v. *Linen Supply Institute,* 18 FRD 452 (SDNY); *U. S.* v. *Maine Lobsterman's Ass'n.,* 22 FRD 199 (D. Me); *U. S.* v. *A. B. Dick,* 7 FRD 442 (ND, Ohio); *Penn* v. *Automobile Insurance Company,* 27 F. Supp. 336 (DC, Ore., 1939); *U. S.* v. *Bridges,* 86 F. Supp. 931 (ND Cal., 1949); *Hall Harrigan & Sons* v. *Enterprise Animal Oil Company, Inc.,* 18 FR Serv. 33.325, Case 1 (ED Pa., 1953).

In fact, this Court itself noted in *U. S.* v. *Blue,* 384 U. S. 251, that the remedy for obtaining incriminating evidence in a companion civil proceeding is to suppress the evidence and its fruits in the criminal case and not to grant immunity from prosecution. *Cf. U. S.* v. *Light,* 394 F. 2d 908 (CA 2, 1968). In the case at bar, this is precisely the remedy invoked by the Court of Appeals. The foregoing cases and the decision of the Court of Appeals below are founded upon public policy, rooted in historical and settled concepts of anglo-saxon criminal jurisprudence that a prospective defendant should not be required to disclose evidence to sustain the prosecution in a criminal case, or evidence of defense, and that this is a matter not only of privilege against self-incrimination, but of the policy in criminal cases which opposes inquisitorial procedures. *Boyd* v. *U. S.,* 116 U. S. 616.

When viewed in the light of the present record, it is seen that there is nothing in the opinion of the Court of Appeals, or the facts of this case, which suggests that the Court below decided a question in a manner contrary to the decisions of this Court or of other Courts. What is involved here is merely the application of two settled rules of this Court: (a) the rule in *Boyd* v. *U. S., supra,* that a discovery should never be ordered which might tend to convict a party of a crime or to forfeit his property; and (b) the rule in *Wilson* v. *U. S., supra,* that an officer of a corporation does not lose his personal privilege against self-incrimination under the Fifth Amendment by reason of his corporate position and may not be required on behalf of the corporation to utter a single self-incriminating word. Nothing in the holding of the Court below restricts the Government's right to use discovery in a civil case nor to bring a companion criminal action based upon the same facts. What is prohibited is the use of evidence and leads in a criminal case obtained by a deliberate and calculated utilization of compulsory discovery in a civil case involving the same facts and parties.

4. Petitioner argues that the decision below is in conflict with decisions of other Federal Courts of Appeals as to the question of whether the submission of interrogatories to the corporation compelled the individual respondents to incriminate themselves or suffer forfeiture of their property. None of the cases cited on pages 10 and 11 of the petition deal with the issue involved herein, namely, whether incriminating evidence obtained by compulsory discovery should be suppressed in a criminal case based upon the same facts. Rather, in those cases, the issue was merely whether the corporation should or could appoint an agent to furnish the requested information without fear of self-incrimination. Those cases did not deal

with the issue here presented to the Court of Appeals, namely, whether evidence, leads and admissions obtained via compulsory discovery, over respondents' objection, and at a time when respondents were the targets of a criminal prosecution for the identical factual matters sought to be elicited by the interrogatories, should have been suppressed in the criminal case. Nor did those cases deal with the present situation where an officer of the corporation, over objection, had in fact answered interrogatories which provided evidence and leads necessary to commence and prosecute a criminal case. Moreover, here, the record contains absolutely no evidence that someone other than respondents Feldten or Kordel were available to answer the extremely broad and searching interrogatories.

Even if the corporation was duty bound to find someone willing, even if not legally bound, to act for it in answering the interrogatories, there is no proof that such a volunteer was available. Since the burden of proving that a volunteer was available rests upon the Government, *Communist Party* v. *U. S.*, 331 F. 2d 807, 815 (CA DC, 1963), *cert. denied,* 377 US 968, petitioner is in no position to argue that respondents were not coerced in supplying answers to the interrogatories.*

As the Court of Appeals properly pointed out, in that posture, respondents were faced with the alternatives of refusing to answer after ordered to do so, which would have resulted in the forfeiture of the seized property, providing false answers and thereby subjecting themselves to possible prosecution for perjury, or supplying the required information and thereby incriminating themselves in the contemplated criminal action. In selecting the third alterna-

* The interrogatories were specifically related to Feldten and Kordel and logically, only they would know and could provide the answers.

tive, no waiver of their Fifth Amendment privilege against self-incrimination may be inferred. In order to harmonize the rights of all parties, the Court of Appeals properly held that the only effective remedy was to suppress the evidence and leads thus obtained.

5. Petitioner erroneously argues that the submission of answers to the interrogatories constituted a waiver of respondents' Fifth Amendment privilege against self-incrimination and an uncoerced submission of information. The fact is, however, that a timely motion for a protective order against being required to answer the incriminating interrogatories was made—the best possible proof that respondents did not intend to waive and indeed, sought to safeguard their self-incrimination privilege. Moreover, the motion was denied by the District Court on the ground that there was no certainty that the threatened criminal prosecution would ever be brought. Implicit in the District Court's ruling, therefore, was the underlying concern against the use of the answers in the criminal case if it should be brought. Further, after being ordered to answer the interrogatories, additional objections to the broadness of certain of the interrogatories were again made and, again, overruled.

6. Petitioner argues that the interrogatories, as such, were not introduced as evidence in the criminal case. The fact is, however, that the answers to the interrogatories were used before the Grand Jury and that the proof of the crucial element of interstate commerce in the criminal case was provided by the answers to the interrogatories. Further, the Court of Appeals found that the Government had not proved that evidence and leads obtained thereby through the interrogatories had not been used to secure the indictment or evidence submitted at the trial.

While it is true that respondent Kordel did not sign the interrogatories, the Court of Appeals correctly pointed out that Kordel was under the same compulsion, by reason of the peculiar circumstances of the instant case, to provide the answers. Here, as the Court noted, the interrogatories were for the most part requests for admissions by and information concerning respondent Kordel and dealt with the personal activities of Kordel with respect to the matters directly under scrutiny in the contemplated criminal action. Moreover, the Court of Appeals noted that the admissions by Feldten were not useable against Kordel under the rule of *Bruton* v. *U. S.*, 391 US 123.*

7. Petitioner further suggests that the interrogatories at issue were not unreasonably broad and sought only information directly pertinent to the civil case. The Court of Appeals made short shrift of this contention by noting that the interrogatories were far broader than would ordinarily be needed in a civil case, that they were directed specifically at the activities of respondents Kordel and Feldten, principal defendants in the criminal case, that they requested numerous admissions, and, in short, they were unbelievably comprehensive and detailed—more than 1,300 questions were asked. In this connection, the question of good faith of the Government in propounding the interrogatories, while open to serious question, is not the basic issue. The issue here is whether respondents were compelled to testify against themselves. The Court below held that a violation of the Fifth Amendment cannot be

* While it is true that the interrogatories and answers as such were not physically introduced at the trial, the fact is that the information obtained therefrom was used to investigate and prosecute defendants and provided evidence which formed the basis of numerous questions and leads which motivated the calling of witnesses pertaining to crucial elements of essential proof, i.e. interstate commerce. In addition the answers were physically used in the proceedings before the Grand Jury.

condoned merely because the agents of the Government may have acted in good faith.

8. Here, there is involved a shocking example of agency indifference to abusive inquisitorial authority and an actual misuse of the discovery procedures available under the Federal Rules of Civil Procedure. The holding and rationale of the Court of Appeals is entirely consistent with the holdings of this Court recognizing and invoking exclusionary rules where evidence has been gained in violation of an accused rights under the Constitution, Federal Statutes or Federal Rules of Procedure. *Boyd* v. *U. S., supra, Wilson* v. *U. S., supra, Blue* v. *U. S., supra, Mallory* v. *U. S.,* 354 US 449, *McNabb* v. *U. S.,* 318 U. S. 332, *REA* v. *US* 350 US 214.

CONCLUSION

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May, 1969